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No. 1028

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

GEORGE S. ATKINSON ET AL.,

Petitioners,

CITY OF DALLAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Jurisdiction

No substantial federal question is presented in this case, and therefore no jurisdiction exists to review the decision of the Supreme Court of Texas. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288; *Arizona v. California*, 283 U.S. 423. *Griggs v. County of Allegheny*, 369 U.S. 84, involved damages rather than an injunction as does the instant case and therefore *Griggs* is not in conflict with the decision of the Supreme Court of Texas review of which is sought herein.

Question Presented

Whether an injunction will be granted to restrain a public improvement authorized by statute where an adequate

remedy for damages is specifically provided by the State Constitution?

Statement of the Case

Petitioners seek to enjoin the City of Dallas from awarding a contract to construct a runway parallel to an existing runway at Love Field, the airport serving the City of Dallas. This airport was constructed by the army in 1917 (R. 274) and has been owned and operated by the City since 1928. When the airport was acquired the surrounding area was uninhabited open country.

All of Petitioners have purchased their property near the airport since 1947, some of them as late as 1956 (R. 462). Some of Petitioners' own property which is located more than 2200 feet from the north end of the proposed parallel runway and others own property which is located more than 3000 feet from the south end of that runway. Although a three-day evidentiary hearing was held, no evidence was offered that airplanes using the proposed parallel runway would fly over Petitioners' property at any particular height. Jet aircraft use about 4500 to 5000 feet of runway in taking off (R. 272, 517) and these planes rise about 1000 to 2000 feet in 4000 feet of flight (R. 291). When landing they touch down on the runway about 750 feet from the approach end (R. 235) and can stop in about 3500 feet (R. 477). One of Petitioners who was their major witness testified that while the existing runway generated much air traffic (R. 463) this runway is considered safe (R. 465).

The existing runway is 7800 feet in length and the proposed parallel runway will be 8800 feet in length.

The City will pay the entire cost of this project. No federal funds are involved. The City bonds to finance this runway cannot be issued so long as this litigation is pending.

It is imperative that construction of this runway begin at the earliest possible moment. Due to jet aircraft the proposed runway is crucial to safe operation of the airport (R. 140, 267-268, 270, 320-321, 571). The airport has been designated as a "survival airport" in case of national emergency. It is vital that this summer of 1962 be utilized for construction as winter weather delays may accelerate the dangers caused by operation of the airport without the proposed runway. The ever changing and increasing cost picture may cause the low bidder on the contract to withdraw his bid unless work can begin now on this project.

Fourteen Texas judges have unanimously rejected all of Petitioners' contentions.

This is a nuisance lawsuit. Petitioners have not only lost unanimously in the three state courts before whom this case has come but they deliberately have delayed perfecting appeals until the last moment all along their route to this Court so as to cause maximum injury to the public interest which supports the immediate need for this runway. Petitioners filed their appeal from the District Court to the Court of Civil Appeals on the 59th day, sixty being the limit. Thirty days are allowed for application for Writ of Error from the Court of Civil Appeals to the Supreme Court of Texas and Petitioners filed on the last day. Ninety days are allowed for the filing of a petition for writ of certiorari to this Court and again Petitioners filed on the last allowable day.

The Supreme Court of Texas took note of these delaying tactics and not only denied the application for a Writ of Error but also denied Petitioners the right to file a motion for rehearing on the denial of this application for a writ of error. The record contains Respondents' Motion to Advance which recites the facts upon which this action was based. Respondents have been powerless to prevent these

delays. In all courts—as here—Respondents have filed their answers within a few days in each Court rather than taking the time allowed for such responses. In addition, Respondents have asked the courts below to advance this case for immediate hearing and the courts have granted those motions because of the public interest involved.

I

No substantial Federal question is raised by the Petition.

The only question is whether when constructed and put in use the proposed parallel runway will cause a taking of Petitioners' property in violation of the Federal Constitution. The runway will be constructed far from Petitioners' property, entirely on city-owned land so no actual taking is involved. The alleged taking relates to what effect the proposed new parallel runway will have on Petitioners' property located from 2200 to 3000 feet from the end of a 8800 foot runway, from which runway aircraft will take off in 4500 to 5000 feet (R. 272, 517) and touch down about 750 feet from the approach end, stopping in about 3500 feet (R. 235, 477). No facts as to effect of use of the proposed runway on Petitioners' property are set forth in the record, and evidence of aircraft noise though offered was never related to Petitioners' properties. Since the aircraft will rise from 750 to 2000 feet in 4000 feet after take off (R. 291), it is obvious that the aircraft, if it passes over Petitioners' property at all in taking off, will do so more than one mile after take off and at a height in excess of 1000 to 2000 feet.

While it is contended that the decision herein conflicts with *United States* v. *Causby*, 328 U. S. 246 and *Griggs* v. *County of Allegheny*, 369 U. S. 84, this is not correct. Those

cases involved damage claims rather than a complaint seeking an injunction to prevent the building of an airport runway. And they also involved exact facts as to low flights over the property there involved, not pure speculation as in this case.

The record herein is devoid of any facts showing that airplanes using the proposed runway will even fly over Petitioners' property at any particular height. Unlike *Causby* and *Griggs* there is in fact no evidence that there will be any low flights directly over Petitioners' property. The speculation in their Petition that there will be such low flights over their land is therefore entirely without factual foundation in the record.

While anticipatory injury where damages are not adequate compensation might be a basis for injunctive relief, that situation is not this case. Here if any injury will be suffered by Petitioners it can be and must be adequately paid for in damages. *Armour & Co. v. City of Dallas*, 255 U. S. 280. There is in fact no taking of property of Petitioners by construction of the proposed runway and as is made clear in the next section of this brief any consequential damages that might be created by flights over Petitioners' land must be paid for by the City under the express language of the Texas Constitution. Under these circumstances no substantial federal question exists for review by this Court from the "assumed potential invasions" of Petitioners' rights. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324-325.

II

The Texas Courts correctly denied an injunction because any injury, if any, Petitioners will suffer can be adequately compensated for by damages.

It is well established by the decisions of this Court that no injunction will be issued where damages are an adequate remedy. *Armour & Co. v. City of Dallas*, supra; and *Arizona v. California*, 283 U.S. 423, 462. The Texas Constitution provides explicitly that under the facts of this case Petitioners have an express and adequate remedy at law for damages if after the construction of the runway the use thereof will cause them any damage. This fact is made crystal clear by the history of Article I, Section 17 of the Texas Constitution. That article up until 1876 read as follows:

> "No person's property shall be *taken* or applied to public use without just compensation being made unless by the consent of such person." (italics supplied)

The Texas Courts and Courts of other states which had similar provisions, interpreted this language of the Constitution and uniformly held that a person whose property was not actually taken physically had no redress or cause of action for consequential damages. In the light of this history, the 1876 Constitution provided different language and added the word "DAMAGED," so that Article I, Section 17, in part now reads as follows:

> "No person's property shall be taken, *damaged* or destroyed for or applied to public use without adequate compensation." (italics supplied)

See *G. C. & S. F. Railway Co.* v. *Eddins*, 60 Tex. 656. A further elaboration of the change that resulted from this amendment will be found in the case of *G. C. & S. F. Railway* v. *Fuller*, 63 Tex. 467.

From the earliest construction of Art. I, Section 17 of the Constitution, the courts have consistently held that if the work be of a public nature and it does damage to neighboring property, that the work or thing that causes the damage cannot be enjoined or abated but the injured party is relegated to an action at law for damages. *Baugh* v. *Texas and New Orleans Railroad Co.*, 80 Tex. 56. In that case, plaintiffs sued the railroad for damages because of the building of a railroad adjacent to their property on an elevated dump and the subsequent operation of the railroad. The Court in awarding damages for the inconvenience suffered thereby, stated the general rule on page 56 as follows:

> "When a nuisance is created by the construction of works in their nature permanent, and which, as sometimes occur in case of works for a public use, are not subject to be abated, the rule is that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property."

Texas thus goes further than *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, in that Texas allows recovery irrespective of negligence.

The mere construction of the runway will not invade Petitioners' property. If there is damage to Petitioners' property from subsequent use of the runway it is clear that the Texas Constitutional provision just cited provides an adequate remedy by requiring adequate compensation for any damages suffered. And therefore under the *Armour*

and *Arizona* cases, *supra*, the decision below was clearly correct.

III

The proposed revenue bond issue to finance the building of the runway raises no Federal question.

The Texas Constitution nowhere requires that revenue or ad valorem tax supported bonds must be authorized by a vote of the qualified voters. That matter is wholly statutory. See Article 701, 1925 Revised Civil Statutes of Texas. *Moller* v. *City of Galveston*, 57 S. W. 1116.

Revenue bonds are not a debt under the Texas Constitution and their validity has been sustained by the Texas Supreme Court. *City of Dayton* v. *Allred*, 123 Tex. 60. Since the Texas Supreme Court has sustained the validity of the revenue bond statute no federal question exists. *Erie R.R.* v. *Tompkins*, 304 U.S. 64.

IV

Denial of a jury trial does not raise a Federal question in this case.

The facts in this case are undisputed. As the Courts below found there are no issues of fact. No one questions that the City will erect the runway or where Petitioners' property is located. There is no factual dispute that can now be determined by a jury. It is well established that Petitioners have no Federal Constitutional right under the Fifth or Fourteenth Amendments to a jury trial under the facts of this case. *Bauman* v. *Ross*, 167 U.S. 548; *Dohany* v. *Rogers*, 281 U.S. 362.

V

Conclusion

The decision of the Texas Court of Civil Appeals as set forth on pages A-2 through A-12 of the Petition, which was in effect affirmed by the Supreme Court of Texas without a written opinion (A-1), is in all respects correct and upon that opinion and for the foregoing reasons the Petition for Certiorari in this case should be denied.

Respectfully submitted.

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